Petition

81-316

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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

HERITAGE HOMES OF ATTLEBORO, INC.,
PETITIONER,

v.

THE SEEKONK WATER DISTRICT,
RESPONDENT.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Whether the court of appeals fulfilled its duty to render a judgment which, so far as possible, eliminates the effects of racial discrimination where it denied a developer whose project was delayed for two years by the respondent water district's racially discriminatory acts, compensatory damages for the additional cost found by the district court to have resulted from the wrongful acts of the water district?

Parties Below.

At an earlier stage of this case Roger G. DesVergnes, Barbara R. Mann, Harold G. Devine, Jr., and Paul R. Tortolani were additional parties. The only parties remaining at the time of the trial and judgment sought to be reviewed are those listed in the caption to this cross-petition.

Table of Contents.

Question presented	i
Parties below	i
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement of the case	2
Reasons for granting the writ	7
Conclusion	11
Appendix	1a

Table of Authorities Cited.

CASES.

Albemarle Paper Company v. Moody, 422 U.S. 405 (1975)	9
City of Newport v. Fact Concerts, Inc., — U.S. —, 49 U.S.L.W. 4860 (1981)	7, 10
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)	8
Weiner v. 222 East Chestnut Street Corporation, 303 F. 2d 630 (1962), cert. denied, 371 U.S. 935	9

STATUTES.

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	1
28 U.S.C. § 1343	1
42 U.S.C. § 1981	2
42 U.S.C. § 1983	2

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Opinions Below.

The opinion of the District Court for the District of Massachusetts was reported at 498 F. Supp. 463 (1980). The opinion of the Court of Appeals for the First Circuit was reported at 648 F. 2d 761 (1981). Both opinions are reproduced in the Appendix.

Jurisdiction.

The judgment of the court of appeals was entered on March 31, 1981. A timely petition for rehearing was denied on May 18, 1981, and this cross-petition was filed within ninety days of that date. Jurisdiction in this Court is founded on 28 U.S.C. § 1254(1). Jurisdiction in the district court was founded on 28 U.S.C. §§ 1331 and 1343.

Statutes Involved.

United States Code, Title 42

§ 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case.

In this civil rights action brought by the cross-petitioner, Heritage Homes of Attleboro, Inc., under 42 U.S.C. §§ 1981 and 1983, the complaint alleges that the Seekonk Water District denied Heritage's request to have its proposed housing development included in the water district with the intent to discriminate against black persons and to punish Heritage for its willingness to sell houses to black persons. Both damages and injunctive relief are demanded.

The district court dismissed the complaint for failure to state a cause of action. 448 F. Supp. 1256; 463 F. Supp. 686.

The court of appeals reversed and remanded the case to the district court. 601 F. 2d 9.

After a two day non-jury trial, the district court found "based on *overwhelming* evidence that the Water District's refusal to include plaintiff's land within its boundaries was motivated solely by racial considerations." 498 F. Supp. at 467. It also found that Heritage had suffered increased costs as the result of the water district's wrongful conduct. No award of compensatory damages was made, however, because the district court ruled that by increasing its sales prices Heritage had passed the costs onto the buyers of its houses. Although no compensatory damages were awarded, the district court did award punitive damages of $100,000 in order to discourage the obviously racially discriminatory policy of the water district and as a warning to others. The district court further ruled that the water district must extend its boundaries to include Heritage's real estate. The water district appealed and Heritage filed a cross-appeal from so much of the district court judgment that denied it compensatory damages.

The court of appeals affirmed the district court's award of punitive damages and injunctive relief. Rejecting the district court's "passing on losses" analysis, the court of appeals directed the entry of a compensatory judgment in the amount of the extra cost incurred by Heritage in drilling wells plus pre-judgment interest. As to the extra cost incurred by Heritage resulting from the delay wrongfully caused by the water district, the court of appeals ruled that this category of damage, including construction financing, real estate taxes and the repair of vandalism, was more properly viewed as the cost of being forced to invest in assets at a time when Heritage would have preferred to complete its development and sell. It ruled that the conventional measure of this type

of damage is the appropriate interest rate. Because there was no proof of the appropriate interest rate nor proof that appreciation in value of the property was less than what interest on the amount invested would have yielded, the appeals court found no alternative but to hold that compensatory damages for this element were not proven.

Heritage is a Massachusetts corporation* engaged in the development of low priced single family housing. In early 1976, Heritage became interested in purchasing and developing a 150 acre parcel of land in Seekonk, Massachusetts. The land abutted the boundary of the Seekonk Water District, a municipal corporation with geographic limits covering a portion of the town of Seekonk. Land located outside of the water district limits may be added to the district upon petition by its owner and the majority vote of the water district's voters present at a duly called meeting.

Before purchasing the real estate, Heritage inquired of the water district officials as to the possibility of obtaining water for its development. The officials informed Heritage that the chances of inclusion were very good; that the application procedure was just a formality; that the water district already had plans to extend its limits past that area to straighten the boundary and to improve the distribution system; and that there was no shortage of water in the district. Heritage's development of the land would relieve the water district of approximately $20,000 it would otherwise have to spend to put pipes through the area.

In April, 1976, Heritage purchased the property for $300,000 paying $50,000 in cash and financing the balance with a purchase money mortgage. The land had street frontage of 3,900 ft. on four streets. There were eight building lots already laid out and twenty-two more frontage lots could

* Heritage Homes of Attleboro, Inc., a duly recognized corporation, has no subsidiaries or affiliates.

have been laid out and built upon without further approval under the subdivision control law. In addition, there were potentially 114 back lots requiring subdivision approval. Shortly after the purchase, Heritage applied for inclusion of the land and was informed by the water district superintendent that inclusion in the water district was not necessary for seven of the lots on Miller Street because, as to those lots, Heritage would be allowed to tap into the existing main in Miller Street just as three other houses outside the water district and on the same side of Miller Street had done.

On May 11, 1976, the water district voted not to approve the inclusion of Heritage's land. This was the first time in the past thirty-two years that the water district had ever denied an application for inclusion of land. Shortly after May 11, 1976, building permits were issued and Heritage started construction on the seven Miller Street lots. Five of the houses were financed with construction loans from Taunton Co-Operative Bank and two were built with Heritage's own funds. When Heritage received the building permits for the seven lots, both it and the building inspector thought the houses had water in Miller Street. Although Heritage had been turned down by the vote of the water district, in building the houses it relied upon the superintendent's assurance that there was water in Miller Street for those seven houses. Within three or four weeks, Heritage had the seven houses completely framed. Five of them had been completed through plastering; two were closed, roof-tight, plumbing in and ready for plastering. Money had been drawn out of the five construction loans and Heritage's own funds had been put into the other two houses before it learned that the existing water mains and promised water could not be used. The superintendent told Heritage that they had made a mistake and they could not give Heritage water for the seven houses. At that point, Heritage was sitting with seven houses all of which had buyers.

After talking to the superintendent, Heritage made a second application for inclusion, was turned down and immediately applied for the third time and was turned down again. In October, 1977, Heritage applied and was turned down for the fourth time. The water district's refusal to include the land was motivated solely by racial considerations.

After the third turn-down in December, 1976, Heritage made attempts to find alternative sources of water for the development. It hired a consultant who specialized in private water supplies which consist of one artesian well capable of servicing many houses. By the spring of 1978, after three test holes had been drilled, it was determined that there was not enough water for a single on-site water supply. Heritage then hired a well driller to drill individual wells on each lot.

By that time, the seven houses had stood unoccupied for two years and had been severely vandalized. Heritage spent $14,000 reasonably necessary to repair the vandalism. As soon as the wells were drilled, the vandalism repaired and the first seven houses were sold, Heritage began the construction of additional houses. Altogether, Heritage built and sold thirty houses on the street frontage portion of the property.

During the two years that construction and sale of the first seven houses was delayed by the water district's refusal to include the property, Heritage paid interest on its five construction loans in the amount of $20,595.31. This was $17,095.31 more than the $700 per loan Heritage would ordinarily have paid. Also due to the two year delay, Heritage was required to pay $4,366.51 in real estate taxes on the waterless houses. It cost Heritage $43,690.44 more to supply its thirty houses with private wells than it would have cost to connect them to the water district.

Reasons for Granting the Writ.

This cross-petition for certiorari should be granted because the court of appeals has applied a measure of compensatory damages under the Federal Civil Rights Laws which is over-restrictive and at variance with the principles enunciated by this Court. This is a matter of increased importance because the decision in the case of *City of Newport v. Fact Concerts, Inc.*, — U.S. —, 49 U.S.L.W. 4860 (1981) calls upon compensatory damages to serve a deterrent function in correcting governmental abuses of civil rights. Such deterrence cannot be achieved unless compensatory damages are awarded in their fullest measure.

The district court found that the water district's racially discriminatory acts resulted in a two year delay in construction and sale of Heritage's houses. Of the $169,325.70 in compensatory damages claimed by Heritage, the district court ruled that certain items should be excluded. 498 F. Supp. at 467. Recovery for the remaining compensatory damages was denied by the following ruling:

> On the basis of the foregoing I find that the additional cost to plaintiff which resulted from the wrongful acts of the Water District was actually less than $100,000. I further find that by upping the sale price of the thirty houses from the original price of $33,900.00, plaintiff's receipts from its total sales have been increased by $248,840.00.
>
> Clearly therefore even if inflationary factors were to be considered, plaintiff has effectively passed its losses on to the buyers of its homes. 498 F. Supp. at 467 (footnote omitted).

The court of appeals rejected the district court's conclusion that by the passing on of the losses the damages were cancelled. This part of the court of appeals' ruling is supported

by the reasoning in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968) where it was established that a plaintiff could recover damages for overcharges imposed on it in its manufacturing process in spite of the fact that the plaintiff had increased its prices and passed the overcharges onto its customers. This was because, at whatever price the plaintiff were to sell, its profits would have been greater were its costs lower. The court of appeals awarded Heritage compensatory damages in the amount of the increase in water supply cost resulting from being excluded from the water district.

The court of appeals characterized the increase in carrying costs resulting from the two year delay as Heritage's being "forced to invest in assets during a time when it would have preferred to complete its development and sell out." 648 F. 2d at 763. It devised the measure of damages applicable to this element as the return which might have been earned on an alternate investment of a like sum less the appreciation earned on the forced investment. Noting that there was no proof of these two factors, the court of appeals denied recovery for the damages resulting from the two year delay.

The measure of damages employed by the court of appeals in denying Heritage's delay damages seems to be designed primarily to assure that Heritage does not end up with the benefits of appreciation as well as the damages. This measure is inappropriate where, as here, there is no evidence that there was any appreciation as a result of the delay. On the contrary, the evidence showed that the property was the focal point of racial discrimination aimed at limiting the property's ordinary utility. The district court found that the sales price of the thirty houses sold was increased by $248,840 after the two year delay. Rather than finding this to be explained by appreciation, the district court found the increase to be made up of inflationary factors and the passing on of increased costs.

This Court has ruled that " '[w]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief' " and that "[w]here racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975).

It would have required very little adjustment of the remedies to grant Heritage the necessary relief. The delay damages proven by Heritage included $14,000 for the repair of vandalism done to the seven uninhabitable but completed houses during the delay, $17,095.31 in interest paid on the five construction loans during the delay and $4,366.51 paid in real estate taxes assessed on the seven completed but unsalable houses during the delay. Similar damages have been recognized as recoverable by the owner of a construction project delayed by the acts of a defendant. In the case of *Weiner v. 222 East Chestnut Street Corporation*, 303 F. 2d 630 (1962), *cert. denied*, 371 U.S. 935, the plaintiff was the owner of a construction project being built pursuant to a zoning variance. The defendant appealed the issuance of the variance and posted a supersedeas bond in order to stay the construction pending final disposition of the appeal. The bond obligated the defendant to pay any and all damages suffered by the plaintiff by reason of any delay in case the variance was upheld. The variance was upheld and the plaintiff claimed delay damages including $45,480.70 representing an increase in financing costs and $26,120 representing increased costs of construction, labor and materials. It was held that both of these items were recoverable damages arising from the delay. This measure of damages is no less appropriate here where the district court found that the water

district's racial discrimination resulted in the delay and that, with the exclusion of certain items, the increased costs were attributable to the delay.

With the Court's ruling in *City of Newport v. Fact Concerts, Inc.*, — U.S. —, 49 U.S.L.W. 4860 (1981) that municipal corporations are not liable for punitive damages, a proper and full measure of compensatory damages assumes an added significance. In *Newport*, it was recognized that if something more than the presumed public concern for governmental integrity is needed to assure action to correct official misconduct, "the compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office." 49 U.S.L.W. at 4865. If compensatory damages are a deterrence, it is the burden of paying them which commands the public's attention. The burden and therefore the deterrence is decreased by an overrestrictive and inflexible measure in their assessment.

As a matter of equity from an economic viewpoint, Heritage's punitive damages award tends to compensate for the court of appeals' failure to award the full measure of compensatory damages. If the Court should grant certiorari to the water district in No. 80-2172 and determine that it has immunity from punitive damages, equity would demand that any deficiency in the compensatory damage award be corrected.

Conclusion.

If the Court grants the Seekonk Water District's petition for certiorari in No. 80-2172 it should also grant this cross-petition.

Respectfully submitted,

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Appendix.

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLEE,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLANT.

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLANT,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLEE.

Nos. 80-1646, 80-1704.

United States Court of Appeals,
First Circuit,

Argued Feb. 13, 1981.

Decided March 31, 1981.

As Amended by Order Dated
May 18, 1981.

John J. Graham, Boston, Mass., with whom William E. Hickey, Quincy, Mass., was on brief, for Seekonk Water Dist.

Stephen D. Clapp, N. Attleboro, Mass., with whom Armstrong, Pollis & Clapp, N. Attleboro, Mass., was on brief, for Heritage Homes of Attleboro, Inc.

Before COFFIN, Chief Judge, ALDRICH, Circuit Judge and WYZANSKI, District Judge.*

COFFIN, Chief Judge.

This case returns to us after the district court found that there was overwhelming evidence to support the allegations that we previously found to have stated a claim. *See Des Vergnes v. Seekonk Water District*, 601 F. 2d 9 (1st Cir. 1979). Heritage Homes is a corporation engaged in real estate development. It sued the defendant Seekonk Water District for refusing—because Heritage was willing to sell homes to black persons—to include a Heritage development within the District and thus to supply the development with water. The district court found the District liable under 42 U.S.C. §§ 1981 and 1983. It refused to award Heritage compensatory damages because "plaintiff has effectively passed its losses on to the buyers of its homes." Nonetheless it awarded $100,000.00 in punitive damages against the District "[i]n order to discourage the obviously racially discriminatory policy of the District." Both sides appeal. Since the nature of the claim is explained in our earlier opinion, here we add only such facts as become necessary to explain our reasoning.

Considering first the District's appeal, we briefly respond to those arguments by the District that merit comment. First, we have previously decided the District's arguments drawn from *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). *See* 601 F. 2d at 13.

Second, the District asserts that, because the actions of the Town Planning Board are not within the control of the Dis-

* Of the District of Massachusetts, sitting by designation.

trict, the district court's reference to events at a Board meeting was "immaterial." The Board meeting took place immediately following a District meeting. Both were forums for expressions of hostile and incriminating opinion against Heritage's real estate development. Such circumstances permit an inference that persons opposing the development left the earlier meeting to attend the later one. Community attitudes and events can become relevant when "the acts of voters 'may fairly be said to represent official policy.' " 601 F. 2d at 15. Ironically, elsewhere in its brief the District criticizes the district court for failing to appreciate "the necessity for considering much more than random scraps of a [District] proceeding to determine what happened." We do not think that the district court erred by referring to the entire context to assess the plaintiff's charge of racial motivation.

Third, the District claims that evidence of statements made at the District meeting was hearsay and thus improperly admitted. With one exception, the District did not object to the admission of this evidence. The single exception related to evidence that was offered on at least two other occasions without objection. We thus review for plain error, and have difficulty in finding any error at all. Our examination of these statements indicates that they were not offered to prove the truth of the matters they assert. For instance, one witness testified to hearing a person at the meeting state the developers would "bring all of the black people from East Providence to this project." Such statements demonstrate that those at the meeting made or heard racially hostile remarks prior to voting against the real estate development. *See* Fed. R. Evid. 801(c) & 803. The fact, not the truth of the assertion, is the critical element. The District's other evidentiary arguments either are inconsequential or seek to retry disputes of fact whose resolution is properly within the discretion of the finder of fact.

Fourth, the District's argument that its "decisionmaking process . . . is . . . not subject to evaluation" is foreclosed by *Owen v. Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (no qualified immunity for § 1983 municipal defendants), since the District does not explain how it differs from a municipality for this purpose.

Finally, the odious character of the discrimination in this case is a sufficiently "aggravating circumstance[ ]" *Fact Concerts, Inc. v. Newport,* 626 F. 2d 1060, 1067 (1st Cir. 1980), *cert. granted,* — U.S. —, 101 S.Ct. 782, 66 L.Ed.2d 603 (1980), to support the award of punitive damages. The record in this case was adequate to permit the finder of fact to conclude that the District engaged in a deliberate and remarkably overt display of racial discrimination. Although we share our dissenting brother's concern that courts ought not too quickly levy punitive damages against public bodies, we are struck by the thought that insulating such bodies (even where the improper motive, as here, is "overwhelmingly established") would result in allowing the most blatant discrimination to avoid the risk of punitive damages so long as there is open participation, while punishing only minions who act beyond the confines of council rooms. This would be a particularly ironic result in cases where actual damages are trivial, as they often are in cases of racial discrimination.

Turning to Heritage's appeal on its injury award, we note that it suffered two types of damages due to the District's discrimination: increased water supply costs and an approximate two year delay from 1976 to 1978 in developing the housing investment. The former cost arose from the need to drill private wells for each lot instead of simply connecting each to the District's water supply. The latter resulted from Heritage's efforts to persuade the District to admit it and, this failing, from its search for an adequate alternative water supply.

The first cost is measured by subtracting the expense to which Heritage would have been put in connecting with the District from the total cost of drilling the individual wells. The district court figured this cost to be $43,690.44 (calculated by subtracting $28,475.00 from $72,165.44). Heritage does not challenge this sum.

The second alleged cost arises from the fact that Heritage was forced to invest in assets during a time when it would have preferred to complete its development and sell out. This asserted damage would be the value attributed to the loss of use of the funds during the period when Heritage was reasonably precluded from selling the property. The conventional measure is the appropriate interest rate. In this case, assuming that Heritage moved with reasonable diligence to obtain the alternative water supply, the record lacks not only evidence of the appropriate interest rate but, more importantly, evidence that the appreciation in value of the property over the entire period was less than what interest on the amount invested would have yielded. We therefore have no alternative but to hold that compensatory damages attributable to loss of use of money were not proven.

Heritage consequently has succeeded in proving actual damages of $43,690.44. Its failure to prove more simply confines the award to this sum, and does not, as the district court thought in its "passing on losses" analysis, cancel out the damages that Heritage *has* demonstrated.

Finally, Heritage requests prejudgment interest on its compensatory damages. It acknowledges that prejudgment interest in civil rights cases is not mandatory in this circuit. *Furtado v. Bishop,* 604 F. 2d 80, 98 (1st Cir. 1979). It argues, however, that prejudgment interest is required to make injured parties whole when the injuries they suffer are not "intangible." *Id.* at 97. We agree, noting that this normally will be a matter within the sound discretion of the district court

and that "in appropriate circumstances compensatory principles must be tempered by an assessment of the equities." *Cargill, Inc. v. Taylor Towing Service, Inc.*, 642 F. 2d 239, at 242 (8th Cir. 1981). Since the equities of this case do not mandate further tempering, we remand this case to the district court for entry of an award of $43,690.44 plus prejudgment interest on compensatory damages. In all other respects the district court's judgment is *affirmed.* Plaintiff is awarded costs, to include counsel fees in this court, the amount of the latter to be determined by the district court in connection with the pending motion for fees in that court.

ALDRICH, Senior Circuit Judge (dissenting in part).

I agree with the court that the District's improper motive was overwhelmingly established. In this circumstance this is a classic case for considering punitive damages in the true punitive sense. However, I am troubled by the concept that beneficial owners, or customers, of a quasi public utility, or the taxpayers in a municipality, should be punished for actions over which they had, at best, only remote control. A few of the members of defendant District voted against this particular conduct; it appears that most did not vote at all. Nevertheless, the court, bringing to fruition its indication in *Fact Concerts v. City of Newport,* ante, would have these members extensively punished, when their very maximum offense would seem to be negligence. I would think the burden of compensatory damages and attorney's fees enough.

Alternatively, this type of case does not seem to me an appropriate medium to further the deterrent aspect of punitive damages. I wonder how likely this example will serve to get out the voters in some other, unconnected, organization and make them "vote right."

Finally, punitive damages is a highly subjective matter. However improper the conduct in the present case, it is not to be overlooked, when considering the applicability of the principle to this type of defendant, that the mere possibility that some jury may award punitive damages may have a more deterrent effect upon the freedom to vote than that freedom should be burdened with. In sum, I share the thoughts of the district court in *Valcourt v. Hyland,* D.Mass., 1980, 503 F. Supp. 630, 637-40, and would vacate the punitive damage award.

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT.

Civ. A. No. 77-1251-C.

United States District Court,
D. Massachusetts.

Sept. 3, 1980.

Michael J. Duggan, Stephen D. Clapp, Armstrong, Pollis & Clapp, North Attleboro, Mass., for plaintiff.

William E. Hickey, Quincy, Mass., John J. Grahan, Boston, Mass., for Seekonk Water District.

Alvin Jack Sims, Brockton, Mass., for Barbara R. Mann.

Larry Kenna, Lawrence B. Litwak, Choate, Hall & Stewart, John A. Nadas, Boston, Mass., for defendants Devine and Tortolani.

MEMORANDUM

CAFFREY, Chief Judge.

After remand this matter came before the Court for further proceedings.

In 1977 a three count complaint was filed by plaintiff Heritage Homes and its president, Roger DesVergnes, against the Seekonk Water District (the District) and three individual defendants. The complaint alleged that Heritage Homes' application for inclusion of its land in the Seekonk Water District was denied by the District with the intent to discriminate against black or low income persons in violation of 42 U.S.C. §§ 1981, 1983, 1985(3) and the thirteenth and fourteenth amendments of the United States Constitution.

In its orders of April, 1978 and January, 1979 this Court dismissed the complaint and the amended complaint for failing to state a cause of action *DesVergnes v. Seekonk Water District,* 448 F. Supp. 1256 and *DesVergnes v. Seekonk Water District,* 463 F. Supp. 686. After an appeal was filed the three individual defendants were dropped from the suit leaving only the District as appellee. The Court of Appeals affirmed the judgment of dismissal as to DesVergnes on all counts and as to Heritage Homes on Count II. However the Court ruled that Heritage Homes had stated a claim against the District under 42 U.S.C. § 1983 (Count I) and also under § 1981 (Count III), *DesVergnes v. Seekonk Water District,* 601 F. 2d 9 (1979).

In its decision the Court of Appeals ruled (1) that the complaint set forth a "case or controversy" within the meaning of Article III; (2) that Section 1981 creates an implied right of action for Heritage Homes against any person who with racially discriminatory intent injured it because it had contracted with black persons in the past; (3) that Heritage Homes also has standing under Section 1983 because a State may not discriminate against a corporation for its willingness to contract with blacks, (4) that a municipal corporation such as the District could be held liable under both Section 1981 and Section 1983, and (5) that the District's liability under Sections 1981 and 1983 could be premised on a vote of the

voters of the District because a majority vote could fairly be said to represent official policy.

On the basis of the foregoing rulings the case was remanded and further proceedings consisting of a two day non-jury trial were held. I find and rule as follows.

LIABILITY

Plaintiff Heritage Homes is a corporation engaged in the business of real estate development. Its president and sole shareholder is Roger DesVergnes. At some time prior to February, 1976 Heritage Homes became interested in developing approximately 150 acres of land in Seekonk, Massachusetts known as Pritchard Farm. Although plaintiff envisioned the ultimate development and sale of about 145 lots, the development and sale of only 30 homes would make the land purchase economically feasible.

I find that the plaintiff's acreage abutted the Seekonk Water District and that in February, 1976 prior to the purchase of the property Roger DesVergnes went to the Water District office and met with the District's Superintendent Roger Wilbur. DesVergnes later had a second meeting with Wilbur and several water commissioners. At both meetings the possibility of including plaintiff's land in the Seekonk Water District was discussed. DesVergnes was advised that Heritage Homes could not apply for inclusion in the District until it purchased the property but that there was no water shortage and that the District had hoped to extend the main water line in the direction of the Pritchard Farm as part of its normal expansion.

In April, 1976 plaintiff purchased the property for three hundred thousand dollars. It paid fifty thousand dollars in cash and financed the balance with a purchase money mortgage from the Taunton Cooperative Bank. The land included

eight house lots on Miller Street for which no Planning Board approval was required under the subdivision control law.

On the other side of Miller Street there was a subdivision known as Fieldwood Estates which at that time contained one hundred houses and now contains between one hundred twenty-five and one hundred fifty homes. Fieldwood Estates was in the Water District.

Shortly after the purchase Roger DesVergnes returned to the water district office to apply for inclusion of plaintiff's land in the Water District. At that time he discussed with the Superintendent the appropriate method of extending the main water line and the distribution of costs incident to that extension. The Superintendent stated that the extension would benefit the District, improve water pressure in the Fieldwood Estates development and reduce taxes. DesVergnes was also informed that inclusion in the Water District was not necessary for seven of the lots on Miller Street upon which Heritage Homes intended to build because as to those lots plaintiff would be allowed to tap into the existing main just as three other houses on the same side of Miller Street had done.

On May 1, 1976 percolation tests were performed on thirty of plaintiff's street lots. Present on the property that day were the Seekonk Building Inspector, two Seekonk Selectmen and the real estate broker who had an exclusive sales contract for the proposed development. One of the two selectmen was present because he had received phone calls from members of the community expressing concern that Heritage Homes intended to build low income housing on the property or concern that HUD financing would be available to purchase the proposed houses. The callers were afraid that a lower class of people or undesirable people would be attracted to Seekonk as a result of the project.

Mr. DesVergnes took the two selectmen to North Attleboro to show them a development of homes identical to those planned for the Seekonk acreage. The selectmen told him that they did not want Heritage Homes to continue with its Seekonk project because it would attract blacks and Puerto Ricans from East Providence to Seekonk.

Between May 1 and May 11, 1976, the Building Inspector received nine or ten telephone calls from people he knew to be residents of Fieldwood Estates in which he was informed of a rumor that plaintiff planned to build HUD housing for low income families and that such a development would attract blacks and Hispanics to Seekonk. The callers asked what the Building Inspector planned to do to slow down the development.

At the same time Roger DesVergnes began getting threatening phone calls in which he received warnings not to continue with the development and threats that it would be burned down.

On May 11, 1976 a water district meeting was held. Included on the agenda for the meeting was Article 17, a motion to include the property of Heritage Homes in the Water District, and Article 18, a motion to include another 125 acres of land, owned by the Monterey Corporation, in the District. The Monterey Corporation land was destined for the development of homes in the $45,000 to $49,000 price range compared to the $33,900 price projected by Heritage Homes.

The meeting was attended by a larger crowd than usual with eighty to eighty-five Water District members present. When Roger DesVergnes arrived with his brother they sat in the last row of seats. From there they were able to overhear various conversations in which the voters were discussing among themselves the Heritage Homes project. The gist of these conversations was that the builder was planning to put in "Section 232" housing; that the project would bring in

black people from nearby East Providence; that Water District members would have to sell their houses at a loss because they didn't want colored people in Seekonk; and that the subdivision must be stopped if the voters were to protect the value of their property.

When Article 17 was reached it was read aloud by water commissioner James Olean who recommended that the voters act favorably on it. He advised those present that there was enough water to service both the Heritage Homes property and the property of Monterey Corporation described in Article 18. He moved for the approval of Article 17 and his motion was seconded. The floor discussion of Article 17 lasted twenty-five to thirty minutes with a number of voters speaking against it and none in favor of it. It became apparent that many had attended the meeting for the sole purpose of defeating Article 17. One speaker said that he understood that the houses proposed by Heritage Homes would bring black people to the area. Another man asked where the builder was. When DesVergnes understandably hesitated to identify himself the man demanded to see the builder who planned "to put up this low income housing in this town." DesVergnes then stood up but when he was asked by the same voter "What kind of shacks are you going to build in this town?" DesVergnes lost his temper and responded that it was none of the questioner's business. DesVergnes then left the meeting. The voters defeated Article 17 by a vote of sixty-six to eight.

According to District records no one else has ever been denied inclusion in the Water District in its thirty-two year history. The Superintendent testified that voter acceptance would have benefitted the voters economically. The water commissioners who testified could not explain why Article 17 was voted down.

Immediately after the defeat of Article 17, forty-three voters left the meeting. Those who remained approved Article 18 to expand the District so as to include therein the land of Monterey Corporation.

After leaving the Water District meeting the DesVergnes brothers were scheduled to appear before the Seekonk planning board in a routine building permit application. Quite a few people arrived before them and asked many questions about the Heritage Homes project. As a result the Planning Board had some difficulty keeping the meeting in order. When the DesVergnes brothers arrived they were followed by a large group of people many of whom had come directly from the Water District meeting. The meeting hall was not big enough to hold the crowd.

Jean Nelson, owner of the Monterey Corporation, testified that there was a group of Fieldwood residents at the meeting who were members of an organized neighborhood telephone network designed to "get out the vote" on certain issues. She testified that one woman appeared to be leading that group. People in the rear of the hall were overheard to say "We stopped him at the Water District and we'll stop him here." A woman who did not recognize Roger DesVergnes and his brother told them "if we don't stop this thing here tonight ... you will have all the niggers in town." Those attending the meeting were informed by the Chairman of the Planning Board that approval of the application was a routine Planning Board procedure.

At some point after May 11, 1976 the Planning Board issued the building permits. Because it had been denied inclusion in the Water District Heritage Homes proceeded to construct only the seven houses on Miller Street for which it had been advised that inclusion in the District was unnecessary because the existing main could be tapped. Construction of five of the seven houses was financed with loans from the

Taunton Cooperative Bank. The other two were built with Heritage's own funds. Within three to four weeks Heritage had the seven houses completely framed. Five of them had been completed through the plastering stage. Two were closed, roof-tight, plumbing in and ready for plastering. Money had been drawn out on the five construction loans and Heritage's own funds had been put into the other two houses.

At about that time DesVergnes learned that Heritage Homes would not be allowed to tap the existing water lines and that the promised water would not be available. Superintendent Wilbur told him that a mistake had been made and that the seven houses could not have water unless they were within the District although three other houses on the same side of Miller Street as those houses and not within the District had been allowed to tap the same existing main. Heritage had already found buyers for all seven of the houses.

Heritage Homes made four subsequent applications for inclusion in the water district. The first three were denied and it was refused a hearing on the fourth. After the third denial in December, 1976 Heritage Homes investigated alternative sources of water. It hired a consultant to investigate the possibility of digging one artesian well to service a number of homes. By the spring of 1978 after three test holes had been drilled it was determined that the water supply was inadequate to accommodate such a well. Heritage finally hired a well driller to drill individual wells for each lot.

However, while standing unoccupied for two years, the seven houses had been severely vandalized. As soon as the wells were drilled, Heritage repaired the damage and the seven houses were sold. Altogether Heritage Homes has built and sold thirty houses on the street frontage portion of its property.

I find based on *overwhelming* evidence that the Water District's refusal to include plaintiff's land within its boundaries was motivated solely by racial considerations. In making this finding I am particularly mindful that in the thirty-two year history of the District no other applicant ever has been refused admission and that all the factors usually considered important in making such a determination favored a decision opposite to the one reached by the water district.

DAMAGES

During the two year delay in construction and sales which resulted from the racially discriminatory acts of the Seekonk Water District, plaintiff claims that it suffered damages of $169,325.70 as follows:

Vandalism	$ 14,000.00
Interest on construction loans	17,095.31
Real estate taxes on lots	4,366.51
Real estate taxes on land	14,573.87
Interest on land loan	47,124.57
Installing wells	72,165.44
Total:	$169,325.70

I rule that the $47,124.57 in interest paid on plaintiff's land loan should be excluded and that the amount should be further reduced by $28,475.00 which is the amount that Heritage Homes would have paid to supply the thirty houses with water if they had been rightfully included in the Water District.[1] The amount should be further reduced by that portion of the real estate taxes which is attributable to the undeveloped acreage that plaintiff still owns.

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[1] Roger DesVergnes testified that if included in the district it would have cost only $125,000 to provide the seven houses on Miller Street with water and $1,200.00 for each of the other lots.

On the basis of the foregoing I find that the additional cost to plaintiff which resulted from the wrongful acts of the Water District was actually less than $100,000. I further find that by upping the sale price of the thirty houses from the original price of $33,900.00, plaintiff's receipts from its total sales have been increased by $248,840.00.[2]

Clearly therefore even if inflationary factors were to be considered, plaintiff has effectively passed its losses on to the buyers of its homes.

However such a distribution of losses should not result in a windfall to the Seekonk Water District. In order to discourage the obviously racially discriminatory policy of that district and as a warning to others, I therefore rule that the Seekonk Water District should pay $100,000.00 in punitive damages to the plaintiff.

I further rule that the District must extend its boundaries to include Heritage Homes property in the event that Heritage Homes or its successors should decide to continue its development in accordance with the zoning bylaws currently in effect. Heritage Homes is to file such an application within 30 days of the date of this opinion and if it does so, the District must expand its boundaries within 90 days from its receipt of such a request in writing from Heritage Homes.

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[2] Roger DesVergnes testified that plaintiff's sales total $1,265,840.00 while total sales at the original price would have been $1,017,000.00.

United States Court of Appeals for the First Circuit

No. 80-1646

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLEE,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLANT.

No. 80-1704.

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLANT,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLEE.

ORDER OF COURT

Entered March 31, 1981

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The cause is remanded to the district court for the entry of an award of $43,690.44 plus judgment interest on compensatory damages. In all other respects, the district court's judgment is affirmed.

Plaintiff is awarded costs to include counsel fees in this court, the amount of the latter to be determined by the district court in connection with the pending motion for fees in that court.

In the matter of execution of judgment, stayed by order of this court on March 26, 1981, the district court is authorized to vacate the stay insofar as it would apply to a judgment for compensatory damages, but in view of the fact the Supreme Court has granted certiorari in the somewhat similar case of *Facts Concerts, Inc.* v. *Newport,* 626 F. 2d 1060, 1067 (1st Cir. 1980), cert. granted, 49 U.S.L.W. 3443 (1980) as to punitive damages, if defendant wishes, and will proceed promptly to seek certiorari from our affirmance of that judgment, the stay of execution in that respect shall remain pending action by the Supreme Court in that case, and thereafter until further order of the district court.

Mandate is to issue forthwith.

By the Court:

/s/ Dana H. Gallup
Clerk.

United States Court of Appeals for the First Circuit

No. 80-1646

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLEE,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLANT.

No. 80-1704.

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLANT,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLEE.

Before COFFIN, *Chief Judge*,
ALDRICH, *Circuit Judge*,
and WYZANSKI, *District Judge*.*

ORDER OF COURT

Entered May 18, 1981

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* Of the District of Massachusetts, sitting by designation.

Our opinion in this case is modified according to the printed opinion that we issue today. The Seekonk Water District's Motion to Recall Mandate for Purpose of Entertaining the Petition for Rehearing is constructively granted. The Petition for Rehearing is hereby denied and mandate is constructively hereby reissued. We deny the Motion to Extend Stay of Execution of Entire Judgment in light of our order of March 31, 1981.

By the Court:

/s/ Dana H. Gallup
Clerk.

Opposition

Office-Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HERITAGE HOMES OF ATTLEBORO, INC.,
Petitioner,

v.

THE SEEKONK WATER DISTRICT,
Respondent.

Brief in Opposition to Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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September, 1981

Question Presented

Whether the Court of Appeals correctly applied established principles for awarding compensatory damages.

Parties Below

The parties are correctly stated in the cross-petition.

Table of Contents

	Page
Question presented	i
Parties below	i
Opinions below, Jurisdiction and Statutes involved	1
Statement of the case	1
Reasons for denying the writ	2
Conclusion	3

(No Authorities or Statutes are Cited)

IN THE

Supreme Court of the United States

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Brief in Opposition to Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The opinions below, jurisdiction and statutes involved are correctly stated in the cross-petition.

STATEMENT OF THE CASE [1]

This is a civil case brought by a private corporation against a municipal corporation. The District Court declined to award the plaintiff any compensatory damages, concluding that any losses suffered by the corporation had been passed on to its customers and recovered through an increase in the selling price of the homes it constructed. The Court of Appeals reversed and

[1] A complete statement of the case is set forth in the Petition for Certiorari in Docket 80-2172.

awarded compensatory damages representing the cost of drilling individual wells for the houses. The Court of Appeals noted, as to plaintiff's additional damage claims, that they were "not proven," 648 F.2d 761, 764, App. at 5a.

REASONS FOR DENYING THE WRIT

The question presented does not warrant review by this Court. The Court of Appeals has applied settled rules of law to the award of compensatory damages. No important, new questions of national importance are involved in the compensatory damage determination. There is no conflict in the circuits and petitioner has failed to show any deviation by the Court of Appeals from established principles which requires intervention by this Court.

Respondent agrees that the Court of Appeals erred in awarding compensatory damages. The District Court correctly decided that the plaintiff had recovered all its losses from its customers and that any award of compensatory damages would be a windfall. However, we do not believe errors of this nature are matters to be resolved by this Court and we therefore did not present this issue in the petition in Docket 80-2172. If review of the compensatory damage issue were granted, we would urge the Court to re-instate the District Court's judgment which correctly reflected applicable law.

CONCLUSION

The cross-petition should be denied, regardless of the action taken on the petition in 80-2172.

Respectfully submitted,

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